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Disqualified Witnesses – a Response to Orit Malka

It gives me great pleasure to respond, in print, to this very interesting article. To provide structure to this short piece, I will briefly summarise the main thrust of the author's argument. The focus of Malka's text is a seemingly arbitrary collection of persons (a dice-player, a usurer, pigeon-flyers, and traders in Seventh Year produce) excluded from giving witness testimony in Tannaitic literature. The author argues, contrary to the majority opinion, that the underlying rationale for this list lies in the "negative behaviour" arising out of these occupations. This is then further traced to the notion of "lack of self-control", which Malka then connects to "slavish and feminine" behaviour. Finally, she argues that this list has parallels in the Roman legal experience and connects it to the concept of infamia which, in the author's view, provided the source for the prohibition and which was then "transplanted" and acculturated into Tannaitic literature.

In the remainder of my response, I will address aspects of this argument in reverse order. First, the issue of the "legal transplant". The relationships between Roman and early Jewish law is a well-established field of study in which great figures such as David Daube, and his students Reuven Yaron and Bernard Jackson, to name but a few scholars, have made significant contributions.¹ Given the prominence of one of Daube's other students, Alan

¹ See Alan Rodger, "David Daube: (1909-1999)," Jurists Uprooted : German-Speaking Émigré Lawyers in Twentieth-Century Britain (Oxford: University Press, 2004), 233–48. The links between Roman and early Jewish law is perhaps most thoroughly explored by his two pupils, see Reuven Yaron, Gifts in Contemplation of Death in Jewish and Roman Law (Oxford: Clarendon Press, 1960). Bernard S Jackson, Essays in Jewish and Comparative Legal History (Leiden: Brill, 1975). An exciting new voice in the field is Yifat Monnickendam, "The

Watson, and his theory of “legal transplants”, the idea that Roman law may have provided the intellectual inspiration for the disqualification of certain types of witnesses in Tannaitic literature becomes doubly interesting.² The issue of “legal transplants” in relation to ancient law is a live one and has taken on a new significance in light of recent discussions, the work of Kimberley Czakowski for example, about legal pluralism in the Roman Empire.³ With that said, unlike the textbook case where provisions in a modern Code were incorporated into the Code of another country, the “transplant” in this case is much more subtle. As Malka acknowledges, there is no smoking gun, merely a curious correlation between a passage from Plutarch on poetry and the list of persons excluded in the Tannaitic text. This absence of hard proof necessarily requires the author to do some heavy lifting intellectually. Perhaps some assessment of the textual transmission of Plutarch and the extent to which other ideas from his works have been shown to be prevalent in Tannaitic texts might have strengthened the case further.⁴

Exposed Child: Transplanting Roman Law into Late Antique Jewish and Christian Legal Discourse,” American Journal of Legal History 59, no. 1 (2019): 1–30.

² For a survey of the impact of this idea, see now John W Cairns, “Watson, Walton, and the History of Legal Transplants,” Georgia Journal of International and Comparative Law 41, no. 3 (2013): 637–96.

³ Kimberley Czakowski, Localized Law: The Babatha and Salome Komaise Archives (Oxford: University Press, 2017).

⁴ See, for example, International Plutarch society et al., eds., Gli scritti di Plutarco tradizione, traduzione, ricezione, commento: atti del IX Convegno internazionale della International Plutarch Society, Ravello-Auditorium Oscar Niemeyer, 29 settembre-1° ottobre 2011 = Plutarch’s writings : transmission, translation, reception, commentary : proceedings of the IX International Conference of the International Plutarch Society, Ravello-Auditorium Oscr Niemeyer, September 29-October 1, 2011 (Napoli: M. D’Auria ed., 2013).

Since my perspective is that of a scholar of Roman law, the remainder of my response will focus specifically upon the Roman-law aspect of the “transplant”, namely the notion of infamia. Berger, in his famous Encyclopaedic Dictionary of Roman law, defines infamia as: “evil reputation, the quality of being infamous (infamis).” Furthermore, Berger observes: “Infamia was not only connected with a diminution of the estimation of a person among his fellow citizens but produced also certain legal disabilities according to the grounds for the infamy.”⁵ The link which Malka sees between this Roman legal concept and her Tannaitic passage is articulated as follows: “Those labelled infames ... lost their eligibility to serve as a witness in a court of law”⁶ It is to this lynchpin in her argument that we now turn.

Although Malka focuses on witness and their exclusion from the legal process, it seems prudent to cast the net somewhat wider and to look at the manner in which the Roman legal process dealt with the rich tapestry of humanity that it was created to serve. To that end, I will divide my discussion into two separate sections, namely a) litigants and their representatives, and b) witnesses. It should be noted that my focus here will be largely on civil suits, though criminal suits will be mentioned in passing.

As far as litigants and their representatives are concerned, the matter was governed by the Praetorian Edict. This is not unimportant, since it means that the development of the

⁵ Adolf Berger, Encyclopedic Dictionary of Roman Law (Philadelphia: American Philosophical Society, 1953) s.v. infamia. Those subject to this legal measure are discussed at length in D.3.2. The most recent comprehensive treatment is that of Clément Bur, La citoyenneté dégradée: une histoire de l'infamie à Rome (312 av. J.-C. 96 apr. J.-C.) (Rome: Ecole française de Rome , 2019).

⁶ (xxx). It is on p. 24 of the Ms.

issue was organic and could be revised as Praetors saw fit. According to the third-century jurist, Ulpian, the reasons for the restrictions contained in the edict were:

D. 3, 1, 1, pr Ulp. 6 ad ed.

Hunc titulum praetor proposuit habendae rationis causa suaeque dignitatis tuendae et decoris sui causa, ne sine delectu passim apud se postuletur.

The praetor issued this title for the sake of taking into account and protecting his position and for the sake of his own dignity, to prevent applications being made before him without restriction by all and sundry. [Watson ed.]⁷

The phrase ... suaeque dignitatis tuendae et decoris sui causa ... is clear. Restrictions were imposed upon certain persons not because of their own character per se (goodness or badness), but because of the “dignity and decorum” of the office of Praetor in order to prevent a flood of litigation (...ne sine delectu passim apud se postuletur). Whether this is the actual reason or merely Ulpian’s subsequent rationalisation of the matter does not detract from my general argument.

The Praetorian Edict, Ulpian records, contained three categories of persons upon whom certain restrictions were placed in relation to being litigants or their representatives. D. 3, 1, 1, 3, forbade certain persons on account of their youth or because of a physical impairment (total hearing loss) from accessing the court. This constituted the first category. As the second-century jurist Gaius notes in D. 3, 1, 7 in his commentary on the Provincial

⁷ Justinian et al., The Digest of Justinian. Vols 1-4 (Philadelphia, PA: University of Pennsylvania Press, 1985).

Edict, this was an absolute prohibition which could not be circumvented by the parties agreeing to waive it. It is important to stress that while this appears to be quite an invasive prohibition, it does not, of course, follow that persons in this situation had no access to a Roman court at all. It merely meant that they could not access a Roman court unassisted and would need to use representatives (encompassing tutors and curators) to do so.

The second category is worth quoting in full:

D. 3, 1, 1, 5 Ulp. 6 ad ed.

Secundo loco edictum proponitur in eos, qui pro aliis ne postulent: in quo edicto excepit praetor sexum et casum, item notavit personas in turpitudine notabiles. sexum: dum feminas prohibet pro aliis postulare. et ratio quidem prohibendi, ne contra pudicitiam sexui congruentem alienis causis se immisceant, ne virilibus officiis fungantur mulieres: origo vero introducta est a Carfania improbissima femina, quae inverecunde postulans et magistratum inquietans causam dedit edicto. casum: dum caecum utrisque luminibus orbatum praetor repellit: videlicet quod insignia magistratus videre et revereri non possit. ...

Next comes an edict against those who are not to make an application on behalf of others. In this edict the praetor debarred on grounds of sex and disability. He also blacklisted exceptionally disreputable persons. On the grounds of sex, he forbids women to make application on behalf of others. There is a reason for this prohibition, to prevent them from involving themselves in the cases of other people contrary to the modesty in keeping with their sex and to prevent women from performing the functions of men. Its introduction goes back to a shameless women

called Carfania who by brazenly making applications and annoying the magistrate gave rise to the edict. On the grounds of disability, the praetor rejects the man blind in both eyes ... [Watson ed.]

As Ulpian points out, this second category of prohibitions prevented certain classes of people from acting as legal representatives for others. Unlike the first category, therefore, they could still access the Roman courts as a litigant on their own behalf. Thus, a person who was blind in both eyes, could still be a litigant (since they could participate in the trial), but they could not represent anyone else. Similarly, on grounds of gender, a female person could access Roman courts as a litigant, but only on her own behalf or assisted by a legal representative. She could not represent others. Here Ulpian recounts the tale of one Carfania, an improbissima femina, whose behaviour led to this prohibition being added to the Praetorian Edict.⁸ Additionally, personas in turpitudine notabiles were also included in the second category. There is every reason to suspect that this group, given the placing of item in the sentence, was a later addition. It is important, therefore, to maintain the logic of Ulpian's reasoning. Persons who had been branded infames (the phrase notavit ... in turpitudine is telling) could not act as legal representatives for others in a Roman courtroom. They could only represent themselves.

The final category is described by Ulpian as follows:

D. 3, 1, 1, 7 Ulp. 6 ad ed.

⁸ For a critical examination of the veracity of this statement, see Luigi Labruna, "Un editto per Carfania?," in Synthese Vincenzo Arangio-Ruiz (Naples: Jovene, 1964) 179 - 188.

Ut initio huius tituli diximus, tres ordines praetor fecit non postulantium: quorum hic tertius est, quibus non in totum denegat postulandi facultatem, sed ne pro omnibus postularent: quasi minus deliquerint quam hi qui superioribus captibus notantur.

As we said at the beginning of this title, the praetor distinguished three classes of those not able to make applications. The third class consists of people who are not to apply on behalf of anyone they please but to whom the praetor does not entirely deny the right of applying on the ground that they have been less at fault than those blacklisted in the previous sections. [Watson ed.]

D. 3, 1, 1, 8 Ulp. 6 ad ed.

Ait praetor: "qui lege, plebis scito, senatus consulto, edicto, decreto principum nisi pro certis personis postulare prohibentur: hi pro alio, quam pro quo licebit, in iure apud me ne postulent. "hoc edicto continentur etiam alii omnes, qui edicto praetoris ut infames notantur, qui omnes nisi pro se et certis personis ne postulent.

The praetor says: "Those who are forbidden by plebiscite, senatus consultum, edict, or decree of the emperors to make applications except on behalf of certain persons are not to make applications in my court on behalf of a person other than one for whom they will be allowed to do so." This edict refers also to all those others who are blacklisted as incurring infamia in the praetor's edict. All these are not to make applications except on their own behalf or that of certain people only. [Watson ed.]

It is not my intention to list all of the classes of persons to whom this third category applies. I refer the reader to the remainder of this Digest title where they are set out in detail. As a general rule, persons in the third category could access a Roman court as a litigant and could also represent others. They could not, however, represent everyone. Their ability to represent was limited to certain pre-existing relationships created by law or kinship.

To summarise, the Praetorian Edict, according to Ulpian, made a threefold distinction when it came to litigants. Group one could not access a Roman court on their own as a litigant at all and had to be represented. Group two could access a Roman court on their own as a litigant but could not represent anyone else. Group three could access a Roman court as a litigant and could, in limited circumstances, represent another. One thing is clear from this survey. There certainly was no blanket exclusion of persons who had been branded with infamia from acting as litigants in a Roman court. In fact, as D. 3, 1, 1, 8 make clear, such persons could access a Roman court as a litigant and could also, in limited cases, represent another.

This then brings us to the issue of witnesses. Malka's main argument is that Tannaitic literature excluded a number of persons from being witnesses on account of their "lack of self-control" as visible by their "bad behaviour". Let us examine the Roman evidence. At the outset, it is worth noting that verbal and documentary evidence was commonly used in Roman courts. In both cases, as in modern law, the value of the evidence was judged with reference to its credibility. The fourth-century jurist Arcadius Charisius, who was active during the reign of Diocletian, observed the following:

D. 22, 5, 1, pr Arcad. l. s. de test.

Testimoniorum usus frequens ac necessarius est et ab his praecipue exigendus,
quorum fides non vacillat.

Oral evidence is often and necessarily given and should be sought particularly from
those who are reliable. [Watson ed.]

For witness testimony, as for written documents, fides was key. In the case of written documents as evidence, the fides was often embodied in the manner in which documents had been witnessed in writing and sealed.⁹ As far as witnesses were concerned, their credibility was judged in the following manner, as Modestinus tells us:

D. 22, 5, 2, pr Mod. 8 reg.

In testimoniis autem dignitas fides mores gravitas examinanda est: et ideo testes, qui adversus fidem suae testationis vacillant, audiendi non sunt.

The value of testimony depends on the dignity, faith, morals, and gravity of witnesses. Hence, those who depart from their previous evidence are not to be listened to. [Watson ed.]

According to Modestinus, a range of factors, which included dignitas, fides, mores, and gravitas, had to be examined. The aim of an investigation of these aspects of a witnesses

⁹ On the sealing of Roman documents and their use in court, see Elizabeth A Meyer, Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice (Cambridge: Cambridge Univ. Press, 2008).

character was to ascertain whether they were truthful, since he who adversus fidem suae testationis vacillant, should not be heard as a witness.

Thus, much like the case of litigants, there was no blanket exclusion of a person from acting as a witness in a Roman court by virtue of them being subject to infamia. This much is clear. Of course, the condemnation to infamia could be a factor in determining whether a person is truthful and should be allowed to act as a witness, but this is but one factor among a range of others which had to be taken into account. It is also worth noting that gender was not a bar to acting as a witness.

It remains to discuss Greenidge's account of infamia, since Malka uses it as evidence for the exclusion of witnesses found guilty of infamia. Greenidge's prose is not easy and his account veers off into various asides. The key points are the following:

"The great general principle was that anyone could give evidence, both in criminal and in civil cases, according to the demands of circumstances, except where testimony was legally interdicted or excused."¹⁰

After discussing specific provisions of the Lex Iulia de Vi, he then concludes:

"There was no mention of infames here, and there probably was none in any of the criminal laws of Rome. Where special laws did not make provisions such as those contained in the Lex Julia, the principle followed was the natural one of estimating

¹⁰ A. H. J Greenidge, Infamia, Its Place in Roman Public and Private Law (Oxford: The Clarendon Press, 1894).

evidence according to the character and position; and the application of this principle rested with the judge.”¹¹

There then follows a digression about the provisions contained in the Lex Iulia Repetundarum and the Lex Iulia de Adulteriis. Greenidge concludes:

“We see from these instances how very partial was the legal application of this disability for evidence based on character and on the fact of condemnation; nowhere is it stated that a definite list of infames was ever excluded, as a whole, from testimony.”¹²

In summary, therefore, neither litigants (or their representatives), nor witnesses were ever excluded from access to a Roman court on account of being infames. The law on this point was far more nuanced and turned on the credibility of the witness rather than their “evil reputation”. As many examples in history will attest, evil persons can be truthful.

It is not my intention to engage with the author’s argument concerning the content of infamia and whether it is linked to a “lack of self-control”. Furthermore, I find the equation of this “lack of self-control” with “slavishness and femininity” difficult, and for two reasons. First, the excursus into “liberal arts” and “sordid work” has been taken out of context. The focus of this discussion is an aristocratic disdain for paid work, the reasoning being that one who has to rent out his services for money becomes “a slave” of the wage

¹¹ Greenidge, 166.

¹² Greenidge, 167 - 168.

payer. To what extent this discussion was anything other than aristocratic snobbery has been discussed at length in the literature on the contract of letting and hiring.¹³ The prevailing opinion is that the distinction between liberal arts (performed without the expectation of a wage) and paid labour, did not seem to have much impact in reality. In second place, generalities about “feminine weakness” puts one on shaky ground.¹⁴ There was nothing “weak” about Carfania at all. The accusation levelled against her was that she was improbissima, which is best translated as “wholly immoderate or excessive/totally greedy or rude”. This choice of words, in my view, does tell us something of about Roman attitudes, but I am not sure that it quite support the arguments that the author is making.

Does this, therefore, mean that Malka’s analysis is incorrect? Far from it. There is much to be done about the transfer of ideas been legal orders in the ancient Mediterranean. And it is also clear that the exclusion of certain persons from acting as witnesses in Tannaitic literature is quite peculiar and deserving of detailed scrutiny. Do I think that it was a “legal transplant”? For the reasons outline above, I am not convinced. With that said, it seems to me that if there are indeed common ideas in these two legal orders about witnesses, it likely goes back, as Riggsby has argued, to the issue of their credibility and the Roman understanding of rhetoric of character.¹⁵

¹³ See, for example, Pierre Jaubert, “La Lex Aelia Sentia et La Locatio-Conductio Des Operae Liberti,” Revue Historique de Droit Français et Étranger 43 (1965): 5–21.

¹⁴ On all this, see Suzanne Dixon, “Infirmetas Sexus: Womanly Weakness in Roman Law,” Tijdschrift Voor Rechtsgeschiedenis, 1984, 343–71.

¹⁵ Andrew M. Riggsby, “The Rhetoric of Character in the Roman Courts,” in Jonathan Powell, Cicero the Advocate (Oxford: Oxford Univ. Press, 2010), 165 - 185.

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